No. 15711

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ARTHUR TUGGI BRUNNER,

*Appellant,*

*vs.*

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

*Appellee.*

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## APPELLANT'S BRIEF.

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### Jurisdictional Facts.

This case is brought before the Court of Appeals from a Judgment of the United States District Court in and for the Southern District of California, Central Division, entered May 13, 1957, dismissing plaintiff's complaint for judicial review of an order of deportation.

The District Court had jurisdiction of the matter under Title 28, U. S. C. A. 2201 and Title 5, U. S. C. A. 1009, and this Court has jurisdiction to review the judgment on appeal under Section 28, U. S. C. A. 1291.

## Statutes Involved.

The warrant of deportation[1] [Ex. A, p. 49] charges that appellant is deportable because, at the time of his entry at Honolulu, Territory of Hawaii, on April 23, 1953, he was within a class excludable by law, to wit, aliens who are ineligible for citizenship.

Section 241(a)(1) of the Immigration and Nationality Act (8 U. S. C. 1251(a)(1)) reads as follows:

> "Sec. 241(a). *Deportable aliens—General classes.*
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."

Section 212(a)(22) of the Immigration and Nationality Act (8 U. S. C. 1182(a)(22)) reads as follows:

> "Sec. 212(a). *Excludable classes of aliens* * * *.
>
> (a) Except as otherwise provided in this Act the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *
>
> (22) Aliens who are ineligible to citizenship * * *."

Section 101(a)(19) of the Immigration and Nationality Act (U. S. C. A. 1101(a)(19)) reads as follows:

> "(19) The term 'ineligible to citizen,' when used in reference to any individual, means, notwithstand-

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[1]The certified file of the Immigration and Naturalization Service is before this Court in its original form, and is designated as defendant's Exhibit "A". For the sake of convenience, the pages thereof have been numbered consecutively in red ink, and those page numbers will be cited when reference is made to said Exhibit.

ing the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

Section 4(a) of the Selective Service Act of 1948 (62 Stat. 605; 50 U. S. C. A., App. 454(a)), at the time herein involved, read, in part, as follows:

> "Sec. 4(a). * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *"

## Statement of the Case.

Appellant is a native and citizen of Switzerland, born on August 15, 1925, and is an entertainer by profession. [Ex. A, pp. 68, 69.] He is now married to a citizen of the United States, but was not so married at the time of the deportation hearing in 1955.

Appellant first entered this country at New York, N. Y., on October 15, 1949, and was admitted to reside

permanently. [Ex. A, pp. 70, 93.] He has been physically present in the United States continuously since then except for two short, temporary absences in 1953, comprising of 13 days and 21 days, respectively, when he traveled to Panama and the Carribbean area and to Korea and Tokyo, Japan, as a member of a United Service Organization show troupe for the sole purpose of entertaining United States Armed Forces stationed in those localities. [Ex. A, pp. 70-72.] He received no remuneration for these performances, and was highly commended by the public and military personnel for these unselfish and patriotic gestures. [Ex. A, pp. 70, 31-36, 116.] Paradoxically, it is these re-entries into the United States, while in possession of re-entry permits issued by the Immigration and Naturalization Service, that serve as a basis for the deportation charge.

Appellant registered under the Selective Service and Training Act in 1950, and in the same year filed a Declaration of Intention to become a citizen of the United States. [Ex. A, pp. 72, 75, 81.] During 1949 and 1950, he endeavored on about four occasions to enlist in the United States Air Force. [Ex. A, p. 75.] In the early part of 1951, at a time when appellant had a very meager knowledge of the English language, a friend prepared letters for him to his Selective Service Board proclaiming a desire to be allowed to serve in the United States Air Force and a hope of being exempted from *training* inasmuch as he had just finished four years of service and training in the Swiss Army from 1944 until 1948.

[Ex. A, pp. 75, 80, 88, 113.] On or about April 2, 1951, through a misunderstanding on the part of appellant, his lack of knowledge of the English language, and the necessity of communicating by letter with his Selective Service Board by the pen and hand of his friend, appellant signed SSS Form No. 130, "Application by Alien for Relief from Training and Service in the Armed Forces," and submitted it to his Selective Service Board. [Ex. A, pp. 77-80, 88, 96.]

Prior to proceeding abroad in 1952 and again in 1953 to entertain United States Armed Forces personnel, appellant was issued re-entry permits by the Immigration and Naturalization Service. [Ex. A, pp. 92, 94.] His Selective Service Board also gave written permission for such departures. [Ex. A, pp. 74, 82, 106, 107.] But the Government gave him no warning whatsoever of the legal effect of these departures and re-entries upon his status as a lawful permanent resident of the United States, despite the fact that the file of the Immigration and Naturalization Service was clearly "flagged" denoting that appellant might be subject to exclusion as the result of having signed SSS Form No. 130. [Ex. A, pp. 78, 82-85.]

Appellant again sought a re-entry permit about July, 1954, for the same purpose of proceeding abroad to entertain Armed Forces of the United States. [Ex. A, p. 73.] The permit was refused on the ground that he was no longer a lawful permanent resident of the United States, and on or about January 17, 1955, a warrant

was served upon him to show cause why he should not be deported from the United States. [Ex. A, pp. 73, 91.]

A deportation hearing was accorded appellant by the Immigration and Naturalization Service at Miami, Florida, on February 25, 1955. [Ex. A, pp. 67-90.] In a written decision prepared by the Special Inquiry Officer on March 21, 1955, it was ordered that the deportation proceedings be terminated. [Ex. A, pp. 61-66.] No appeal was filed by the appellant from this favorable decision. Nevertheless, and without statutory or regulatory authority insofar as appellant's counsel can determine, the Special Inquiry Officer certified the case to the Board of Immigration Appeals for its consideration.

On August 30, 1955, the Board of Immigration Appeals directed that the order of the Special Inquiry Officer be withdrawn, and found that the plaintiff was subject to deportation on the charge stated in the warrant of arrest, *i.e.,*

> "That under Sec. 241(a)(1) of the Immigration and Nationality Act, he is subject to deportation because, at the time of his entry at Honolulu, Territory of Hawaii, on August 23, 1953, he was within one or more of the classes af aliens excludable by the law existing at the time of such entry, to wit, aliens who are ineligible to citizenship under Sec. 212(a)(22) of the said Act."

The Board did not enter an order of deportation, but, instead, directed that appellant depart voluntarily from the United States. [Ex. A, p. 59]. It ordered further that if appellant did not depart from the United States,

"the order of deportation be *reinstated* and executed." [Ex. A, p. 59.] Upon failure of appellant to depart within the time allowed, a warrant was issued by the District Director, Los Angeles, California, on December 22, 1955, directing that he be deported. [Ex. A, p. 49.]

On February 24, 1956, the Board of Immigration Appeals denied a motion requesting reconsideration. [Ex. A, pp. 7-9.]

## Specifications of Error.

The District Court erred in concluding that:

1. The Board of Immigration Appeals had jurisdiction to review and withdraw the order of the Special Inquiry Officer dated March 21, 1955, terminating the deportation proceedings.

2. The decision of the Board of Immigration Appeals of August 30, 1955, constitutes a final and valid administrative order of deportation.

3. There was no estoppel created against the Immigration and Naturalization Service by reason of the issuance to appellant of re-entry permits with knowledge of positive excludability, and then predicating deportation upon the last re-entry on April 23, 1953.

4. The findings and warrant of deportation are supported by reasonable, substantial and probative evidence.

## ARGUMENT.

### I.

### The Order of the Board of Immigration Appeals Dated August 30, 1955, Is Null and Void Because of Lack of Jurisdiction.

The deportation hearing accorded the appellant at Miami, Florida, on February 25, 1955, resulted in an order of the Special Inquiry Officer that the proceedings be terminated. No appeal was filed by appellant. Neither the Board of Immigration Appeals nor the Assistant Commissioner, Inspections and Examinations Division, certified the case to the said Board. The Special Inquiry Officer, in his written decision of March 21, 1955, said [Ex. A, p. 65]:

> "An order will therefore be entered terminating these proceedings. However, the record will be certified to the Board of Immigration Appeals for review."

It is appellant's contention that the Board of Immigration Appeals was without jurisdiction to review the order of the Special Inquiry Officer terminating the proceedings.

The Board of Immigration Appeals is an agency created by regulations of the Attorney General. It is not a statutory board. Its power and authority are those which the Attorney General has conferred upon it under authority granted him by Section 103 of the Immigration and Nationality Act (8 U. S. C. A. 1103).

Appellate jurisdiction of the Board of Immigration Appeals is defined in Section 6.1(b), Title 8, Code of Federal Regulations, as follows:

> "(b) *Appellate Jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following: * * *
>
> (2) Decisions of special inquiry officers in deportation cases, as provided in Sec. 242.61 of this chapter; * * *"

The only other means by which the Board may acquire jurisdiction is by *certification,* as set forth in Title 8, Code of Federal Regulations, Section 6.1(c), which reads as follows:

> "(c) *Jurisdiction by Certification.* The Assistant Commissioner, Inspections and Examinations Division, or the Board may in any case arising under paragraph (b)(1) through (6) of this section require certification of such case to the Board."

The Court below made the following Findings of Fact [Tr. p. 17]:

> "X.
>
> The plaintiff did not file any notice of appeal from the order of the Special Inquiry Officer dated March 21, 1955, terminating the proceedings.
>
> "XI.
>
> There is no written direction of the Board of Immigration Appeals or the Assistant Commissioner, Inspections and Examinations Division, to certify this specific case to the Board of Immigration Appeals."

The regulations do not empower the Special Inquiry Officer to certify a case to the Board of Immigration

Appeals for review, and in that manner give jurisdiction to the Board. At the close of his written decision of March 21, 1955, the Special Inquiry Officer stated [Ex. A, p. 66]:

> "ORDER: It is ordered that the proceedings in this case be terminated.
>
> The Board of Immigration Appeals has directed that this case be certified to that Board and the final order will be entered in this case by the Board. You will be allowed ten days in which to submit to this office any brief, memorandum, or request for oral argument, which you desire to be transmitted with the record in this case, for consideration by the Board."

Despite the statement of the officer, the official file does not reveal that the Board of Immigration Appeals ever directed that this case be certified to it for review.

Title 8, Code of Federal Regulations, Section 242.61, reads in part as follows:

> "(c) *Order of special inquiry officer.* The order of the special inquiry officer shall be (1) that the alien be deported, or (2) that the proceedings be terminated, * * *" (Underscoring added.)

Moreover, Section 242.61(e) of Title 8, Code of Federal Regulations, provides that the order of the Special Inquiry Officer shall be final except when the case has been certified or an appeal is taken to the Board of Immigration Appeals.

The source of jurisdiction of the Board is the regulations, and hence, its jurisdiction is limited by the instrument creating it. Since no appeal was taken, and as there is a complete lack of any evidence that the case

was certified in accordance with regulations, the Board never acquired jurisdiction and the order of the Special Inquiry Officer terminating the proceedings was a final order. No citation is necessary for the universal rules that consent cannot give jurisdiction where it is not authorized by law, and that proceedings without jurisdiction are a nullity.

## II.

## There Is No Valid Outstanding Administrative Order of Deportation.

Assuming, *arguendo,* that the Board of Immigration Appeals had jurisdiction to review and reverse the decision of the Special Inquiry Officer, there has been a failure on the part of the administrative officers to ever precisely order the deportation of appellant. Although the District Director at Los Angeles, California, issued a warrant of deportation on December 22, 1955, the purpose of that instrument is to carry out and give effect to an order of deportation previously entered.

The Board of Immigration Appeals in its decision of August 30, 1955, specifically directed that an order of deportation be *not* entered. Its full order was as follows [Ex. A, p. 59]:

> "ORDER: It is ordered that the order of the special inquiry officer dated March 21, 1955 be withdrawn.
>
> IT IS FURTHER ORDERED that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government within such period of time and under such conditions as the officer in charge of the District deems appropriate.

> IT IS FURTHER ORDERED that if the alien does not depart from the United States in accordance with the foregoing, the order of deportation be reinstated and executed."

The Special Inquiry officer terminated proceedings and did not enter an order of deportation. The Board directed that the order of deportation be *reinstated* and executed if the alien did not depart. According to Webster's New International Dictionary, Second Edition, the word "reinstate" is defined as follows:

> "1. To instate, again; to place again (in possession, or in a former position); to reinstall, as to *reinstate* a deposed king or discharged official.
>
> 2. To restore to a fresh or proper condition or state."

Consequently, it would not be possible for the Board to *reinstate* an order of deportation that never had existence.

It is clear from the regulations that an "order of deportation" and a "warrant of deportation" are distinct entities. Section 243.1, Title 8, Code of Federal Regulations, reads as follows:

> "Sec. 243.1. *Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien*—(a) *Issuance.* In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation."

The Immigration and Nationality Act (8 U. S. C. 1252, *et seq.*), relating to the deportation process, makes reference only to an "order of deportation," for example:

> "8 U. S. C. 1252(b)—In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other

law or treaty, the decision of the Attorney General shall be final." (Underscoring added.)

"8 U. S. C. 1252(c)—When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months * * *" (Underscoring added.)

"8 U. S. C. 1252(d)—Any alien against whom a final order of deportation as defined in Subsection (c) heretofore or hereafter issued has been outstanding for more than six months * * *" (Underscoring added.)

While counsel concedes that the Board undoubtedly intended to order deportation upon failure to depart, it did not technically do so. The gravity and state of the proceedings give cause to appellant and counsel to claim the benefit of the omission.

III.

**The Government Should Be Estopped From Predicating Deportation Upon Re-entries Made With Permits Given to Appellant With Knowledge of Future Excludability and Deportability.**

In his decision of March 21, 1955, the Special Inquiry Officer recited in detail the reasons why he terminated the deportation proceedings on the basis of the doctrine of estoppel. He relates that the appellant's Immigration and Naturalization file had a cover sheet on top stating that he had made an application for relief from training and service in the Armed Forces. Further, that although the Immigration and Naturalization Service is not obligated by statute to inform an alien that he would not be readmissible to the United States even though a

re-entry permit had been issued, "it is the practice of the Service to so inform the alien." [Ex. A, p. 64.] The Special Inquiry Officer also said [Ex. A, pp. 64-65]:

> "* * * this officer is of the firm opinion that the doctrine of estoppel by silence may be applied in the error of this Service in granting two reentry permits to the respondent when the file clearly showed on both occasions subsequent to the enactment of the Immigration and Nationality Act that the respondent was excludable from admission to the United States when he presented the reentry permit which was to be issued."

The high purpose of the appellant in these journeys abroad warrants some consideration. His only object was to entertain United States troops. For this unselfish effort, he received written certificates of esteem and commendation from the Department of Defense, military officers of this Government, and was given public approbation, with other U. S. O. volunteer entertainers, in remarks of Hon. Joseph L. Holt of California, House of Representatives, Congressional Record of Thursday, July 9, 1953, pages A4431-A4432. [Ex. A, pp. 31-36, 116.]

Notwithstanding the practice of the Service to inform an alien of possible future excludability or deportability when issuing a re-entry permit, and despite the fact that the administrative file in appellant's case was clearly marked to show that he had signed SSS Form No. 130, and further, that the Immigration authorities were well aware of the exemplary purpose of the trips, the re-entry permits were delivered to appellant without any warning that their use would subject him to exclusion and deportation in the future. The action was akin to entrap-

ment, for the Government by its conduct certainly misled appellant into a false sense of security, all to his prejudice.

Counsel is cognizant of the familiar dictum that there can be no estoppel against the Government or its agency. However, acts or omissions of agents lawfully authorized to bind the United States or direct its course of conduct during a particular transaction may estop the Government. (See *United States v. Certain Parcels of Land,* 131 Fed. Supp. 65 (S. D. Cal., May 3, 1955), and cases cited therein.)

While the Government may proclaim that it was acting within the scope of the law and regulations in issuing and delivering the re-entry permits, it is clear that it undertook such action with notice that appellant would be subject to exclusion and deportation upon return. Since estoppel stands for the basic precepts of common honesty, clean fairness and good conscience, it is urged that the conclusion of the Special Inquiry Officer that the doctrine applies here should be upheld. Even the Board concluded that the issuance of the re-entry permits and the admission of the respondent were *obviously erroneous.* [Ex. A, p. 59.]

## IV.

## There Is No Reasonable, Substantial and Probative Evidence That Appellant Knowingly and Intentionally Waived His Rights to Citizenship.

Prior to entry into the United States for permanent residence, appellant had served four years in the Swiss Army from 1944 until 1948. He considered training and service as two separate things, and believed that he had been well trained. Appellant attempted to enlist in the United States Air Force on at least four occasions. At

the time SSS Form No. 130 was sent to him by his Selective Service Board in early 1951, he had a limited knowledge of the English language, and had to depend upon others to prepare his correspondence and to explain matters to him. Appellant testifies that his only purpose in signing the SSS Form No. 130 was to "get around training." [Ex. A, p. 88.] He adds that:

> "I never, never the least bit tried to duck the Armed Forces, wear the Army uniform or fight for the Armed Forces here. I never had this intention to get out of it." [Ex. A, p. 87.]

In *Moser v. United States,* 341 U. S. 41, 71 S. Ct. 553, it was made abundantly clear that an alien who executed the Selective Service Form entitled "Application by Alien for Relief from Training and Service in the Armed Forces" did not become ineligible for citizenship if he did not knowingly and intentionally intend to waive such rights when he signed the form. *Moser* had been advised by the Swiss Legation to sign the form and had been lulled into a misconception of the legal consequences of applying for exemption. The Court granted him United States citizenship. (To the same effect is the matter of the *Petition of Berini,* 112 Fed. Supp. 837 (U. S. D. C., E. D. N. Y., June 15, 1953).) *Berini,* like appellant, was also a Swiss national, who, when he signed the Selective Service Form, was of the opinion that he would not be debarred from citizenship.

In his decision of March 21, 1955, the Special Inquiry Officer said with respect to appellant [Ex. A, p. 63]:

> "It is very apparent from the review of this record as a whole that the respondent did not desire in 1951 to evade service in the Armed Forces, but only training, and that it was a misunderstanding by the

respondent, and by the Selective Service Board in not properly informing the respondent in view of the aforesaid letter from him (Exhibit 7) as to his reason for signing the form."

Appellant's correspondence with his Selective Service Board was prepared by a friend because of his inadequate knowledge of the English language. Appellant asserts that he did not understand the import of SSS Form No. 130 when he signed it, and did not realize that he would forfeit the opportunity to become a citizen. Like the case of *Moser,* the appellant, because of unfortunate circumstances, never had an opportunity to make an election between the diametrically opposed courses, namely, military service with citizenship, or exemption without citizenship. The Supreme Court said in *Moser v. United States, supra* (p. 47): "* * * nothing less than an intelligent waiver is required by elementary fairness."

Wherefore, appellant prays that the judgment of the lower court be reversed, and that he be found to be not deportable from the United States.

Respectfully submitted,

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